Supreme Court, U.S.
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87-381

No. .....

In The

Supreme Court of the United States

October Term, 1987

ALENE C. JONES

Petitioner

v.

ST. JOHN STEVEDORING COMPANY, INC.
Employer, and
INSURANCE COMPANY OF AMERICA,
Carrier

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the Court below erroneously hold that petitioner, the mother of a deceased longshore worker, contracted away her right to receive statutory death benefits by signing a third party settlement agreement prior to the death of her son?

II. Does the holding of the Court below that petitioner, an undisputed beneficiary under the Longshore and Harbor Worker's Compensation Act, contracted away her right to death benefit conflict with the purpose and intent of the Act and the decisions of this Court and other Courts of Appeals?

III. Does the restrictive construction applied to the settlement contract in this case result in a narrowing of the rights of beneficiaries under the Longshore and Harbor Workers' Compensation Act, in violation of the benevolent aims of the Act?

IV. Does the ruling of the Court below result in serious injury to petitioner, such that the interest of justice requires that this Court address this issue?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

1. Alene C. Jones
2. Johnetta Wilfred
3. St. John Stevedoring Co., Inc.
4. Insurance Company of North America
5. Solicitor of Labor
   United States Department of Labor
6. Director
   Office of the Workers' Compensation,
   United States Department of Labor

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 3, 1987. Petitioner's Motion for Rehearing was denied by order dated July 1, 1987.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 818 F.2d 397 (5th Cir. 1987). The opinion of the Benefit Review Board (B.R.B.) is reported at 18 B.R.B.S. 68 (1986) and is annexed as Appendix A.[1] The opinion of the Administrative Law Judge (ALJ) is reported at 17 B.R.B.S. 109 (ALJ 1985) and is annexed as Appendix B. The settlement agreement is annexed as Appendix C.

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JURISDICTION

The judgment of the Fifth Circuit Court of Appeals sought to be reviewed herein was entered on June 3, 1987. The petition for rehearing was denied by order dated July 1, 1987. This petition is being filed within 90 days after final judgment in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 2350(a).

—o—

STATUTES INVOLVED

The Longshore and Harbor Workers' Compensation Act (LHWCA), as amended, 33 U.S.C. 901, *et seq.*

Title 33 U.S.C. § 909:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as death benefit. . . .

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1 Citations to the Appendix hereinafter will appear "App. —."

Title 33 U.S.C. § 915(b):

No agreement by an employee to waiver his right to compensation under this Act shall be valid.

Title 33 U.S.C. § 916:

No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims . . . .

Title 33 U.S.C. § 933(f):

If the person *entitled to compensation* institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

STATEMENT OF CASE

A. Statement of Facts.

On May 27, 1979, John Henry Jones was rendered a quadraplegic in an accident that occurred in the course and scope of his employment for St. John Stevedoring Company, Inc. (St. John) at the Port of Galveston, Texas. It is uncontroverted that, as a result of this injury, Jones was permanently and totally disabled.

Following his injury, John Henry Jones began to receive weekly disability payments and medical benefits pursuant to the Longshore and Harbor Workers' Compensa-

tion Act (LHWCA). He subsequently filed a third party action for personal injury damages in Texas state court. St. John, his employer, and the Insurance Company of America (INA) intervened in the third party action, seeking full reimbursement for all benefits that Jones received since the date of his accident. Jones then settled his third party suit on December 21, 1981, in the midst of trial. A Settlement Agreement was entered into by Jones, St. John, INA and the third party defendants. (App. C). Pursuant to the agreement, Jones received $1.8 million in cash and the third parties' promise to make future payments to him in the amount of $280,000 per year. The same agreement provided St. John and INA with one hundred percent reimbursement for all benefits paid or owed to John Henry Jones. Both St. John and INA expressly approved this and other provisions of the agreement.

John Henry Jones' mother, Alene Jones, was not a party to the third party action. Nevertheless, she joined in the settlement agreement, receiving $5,000 in settlement of her potential claims against the third parties arising from her son's injuries. The agreement provided further that, in the event John Henry Jones were to die prior to December 15, 1986, Alene Jones would receive the balance of the future annual payments until such date. In the event Alene Jones predeceased her son, all future payments would be made to her son's estate. Even if Alene Jones survived her son, but died prior to December 15, 1986, remaining payments would revert back to her son's estate.

Alene Jones did survive her son, who died on June 18, 1982. Thereafter, Alene Jones claimed the parental death benefits to which she was entitled pursuant to 33 U.S.C.

§ 901 *et seq.* Her claim was controverted by St. John and INA; a formal hearing was held before the Administrative Law Judge (ALJ) in November of 1983.

B. Course of Prior Proceeding and Disposition in Courts Below

a. The Decision of the ALJ.

The Administrative Law Judge, Judge Walley, rendered his decision by order of December 18, 1984, holding that Alene Jones was entitled to parental benefits under the Longshore Act, since it was stipulated that she was economically dependent upon her deceased son, John Henry Jones, at the time of his injury. The employer/carrier appealed Judge Walley's ruling to the Benefit Review Board.

b. The Decision of the B.R.B.

The Benefit Review Board by its decision and order dated January 31, 1986, affirmed the ALJ's award of death benefits to the petitioner. It also held that the employer and carrier were not entitled to offset their obligation for death benefits against the amount received by the petitioner under the terms of the third-party settlement in which she participated. St. John and INA appealed to the Fifth Circuit Court of Appeals for review of the Board's decision on March 10, 1986.

c. The Decision of the Court of Appeals.

Upon appeal, the Court of Appeals for the Fifth Circuit, in an opinion filed on June 3, 1987, reversed that part of the B.R.B.'s order which denied the employer and the carrier's demand for credit against the death benefit received by the petitioner. In reaching its decision, the

Court below stated that it "perceived a contractual basis for requiring credit." *St. John Stevedoring Co., Inc. v. Wilfred,* 818 F.2d 397 (5th Cir. 1987). It argued that the petitioner had voluntarily signed the settlement agreement and also received cash payment and contingent rights in return for release of her claims against the tortfeasors, and also for credit for future compensation benefit. *St. John Stevedoring Co., Inc. v. Wilfred,* 818 F.2d at 400.

The Court of Appeals, however, affirmed the portion of the B.R.B. decision stating that petitioner was entitled to death benefits. *St. John Stevedoring Co., Inc. v. Wilfred,* 818 F.2d at 400. Petitioner does not seek certiorari insofar as the Court below affirmed petitioner's entitlement to death benefit or as to any other part of its decision. Petitioner seeks certiorari with respect to that portion of the judgment of the Court of Appeals which held that St. John and INA were entitled to receive credit against petitioner's death benefits merely because she participated in the signing of the settlement agreement.

The Court below reversed the B.R.B.'s decision even though it recognized that the Longshore and Harbor Workers' Compensation Act was intended by Congress to exclusively govern issues arising under the longshore cases. The Court reached its decision despite the fact that it was aware that death benefit rights are separate and do not accrue until the event of death. 33 U.S.C. § 909.

Moreover, the Court below by its very own words acknowledged and accepted that the B.R.B., the petitioner and the Director of Office of Workers' Compensation Program who intervened as of right, had correctly interpreted the applicable provision of the LHWCA, insofar as the Court did "not disagree . . . with the reasoning of the

B.R.B. on this statutory interpretation." *St. John Stevedoring Co., Inc. v. Wilfred,* 818 F.2d at 400.

Despite these facts, the Court of Appeals reversed the B.R.B, citing a perception of contractual basis for its findings. The Court below reached this erroneous result by a very narrow and restrictive reasoning, mindful of the benevolent purpose of the Act and the well noted rule that the LHWCA or any ambiguity arising thereunder, should be construed liberally in favor of the beneficiary.

d. The Effect of the Decision Below.

The effect the Court of Appeal's decision is that it deprives Alene Jones, the petitioner and dependent Mother of the deceased longshoreman, of her right to death benefits under the statute. It also insulates the employer and the carrier from their liability under the Act. By holding that John Henry Jones' personal injury recovery will be credited against death benefits rightfully owed to Alene Jones, merely because she participated in the settlement agreement, the Court below effectively wiped out petitioner's entitlement to those benefits.

Unlike the Court below, the B.R.B. had taken the totality of the circumstances in this case into consideration in reaching its decision, including the fact that Mrs. Jones had signed the settlement agreement. (App. A). The petitioner and the Director of the Office of Workers' Compensation Program argued and the B.R.B. accepted the fact that the agreement Mrs. Jones signed had no detrimental legal effect on her right to death benefits since at the time she signed the agreement, her son was still alive and she was thus not "a person entitled to compensation within the meaning of the § 933(f) and (g)." (App. A).

The Court below accepted this interpretation or at least did not take issue with it. Instead of construing the statute in light most favorable to Mrs. Jones and in view of the totality of the circumstance of this case, the court below, ignored completely the statute basing its decision on narrow contractual grounds. Had the Court below observed more carefully, it would have discovered that its concern with the contractual provision was also taken into consideration by the B.R.B. in reaching its own decision.

The decision of the Court of Appeals to side step the correct statutory interpretation and construction which it even agreed with in this case, has the effect of not only defeating the purpose of the LHWC Act in safeguarding the interest of deceased longshoremen and those of their dependents, but also the intent of Congress in enacting such an Act. The loss to petitioner, should this Court fail to review the decision of the Court below, cannot be recovered and would render Mrs. Jones and those similarly situated, destitute in contravention of the clear intent of the Act and those of Congress.

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REASONS FOR GRANTING WRIT

I THE COURT BELOW ERRONEOUSLY HELD THAT RESPONDENTS, THE EMPLOYER AND CARRIER, WERE ENTITLED TO CREDIT AGAINST PETITIONER'S DEATH BENEFITS MERELY BECAUSE PETITIONER, THE DEPENDENT MOTHER OF A DECEASED LONGSHORE EMPLOYEE, PARTICIPATED IN THE SIGNING OF A SETTLEMENT AGREEMENT ALONG WITH HER DECEASED SON.

The Court of Appeals held that respondents, the employer (St. John) and the Carrier (INA) were entitled to

credit because Mrs. Alene Jones, the petitioner in this case, voluntarily signed the settlement agreement and received $5000 in cash thereunder. This ruling is in errorr not only because credit does not apply in this situation, but also because the court failed to distinguish between entitlements due under death benefits and *ante mortem* entitlements. *See* 33 U.S.C. 909; *see also State Ins. Fund v. Pesce,* 548 F.2d 1112 (2d Cir. 1977).

Under 33 U.S.C. § 901 *et seq,* the purpose of requiring credit to the carrier and employer is to avoid a claimant's double recovery. *Nacirema Operating Co. v. Oosting,* 456 F.2d 956, 958 at N.3 (4th Cir. 1972), cert. den., 409 U.S. 980 (1972). Respondents in their briefs before the Court below had argued that § 933(f) of 33 U.S.C. entitled them to offset or credit towards any obligation to Mrs. Alene Jones for benefits due under the Longshore Act. The Benefit Review Board rejected this argument and agreed with petitioner and the Director of Office of Workers' Compensation program, that § 933(f) did not apply because at the time the third party settlement was entered into, Mrs. Jones was not "a person entitled to compensation within the meaning of § 933(f)." (App. A). The phrase, "a person entitled to compensation" has been interpreted by the B.R.B. to mean a claimant who is actually being paid by an employer either voluntarily or pursuant to an award at the time the claimant enters into a third-party settlement. *Dorsey v. Cooper Stevedoring Co.,* 18 B.R.B.S. 25, 28 (Jan. 27, 1986).

The Court below accepted petitioner's argument and the BRB's decision. It stated that it did "not necessarily disagree with the statutory interpretation" of the Longshore and Harbor Workers' Compensation Act. *St. John*

Stevedoring Co., Inc. v. Wilfred, 818 F.2d at 400. Nevertheless, the Court below stretched outside the four walls of the Act to "perceive a contractual basis for requiring credit." (*Id.*). It did so on the ground that petitioner had voluntarily signed the agreement and received the $5000 in cash. The Court below made this finding without a showing or determination that the problem presented in this case could not be resolved within the context of the Longshore statute.

The ruling of the Court below is further erroneous on the ground that it failed to make a distinction between death benefits and *ante mortem* entitlements. This failure to recognize the distinctness of these benefits occurred in the face of the now accepted rule among several courts that a worker's right to receive disability payments under the Longshore Act is separate and distinct from the right of the surviving dependents to receive death benefits. *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *State Insurance v. Pesce,* 548 F.2d 1112 (2d Cir. 1977). It has been generally held that the latter right (death benefits) do not accrue until the event of death; and even then, they are governed by the law in effect when death occurs. *See Id.*

Since Alene Jones was not entitled to any benefits under the Longshore Act at the time of the third-party settlement, and did not become entitled to death benefits until her son's death six months later, *Travellers Ins. Co. v. Marshall,* 634 F.2d 843 (5th Cir. 1981), it follows that she could not have given up the right to something that she was not entitled to. This reasoning is perfectly consistently with the ancient maxim that *demo dat quod non habet.* Ac-

cordingly, the Court below should have given effect to the B.R.B.'s statutory interpretation which it fully agreed with, rather than ignoring it completely. This purposeful omission to give effect to a correct interpretation of the law is grave error which this court should rectify.

A. The Circumstances Surrounding the Agreement Indicate That Petitioner's Signature and Receipt of $5000 Had No Detrimental Legal Effect On Her Rights to Death Benefit.

Besides the B.R.B.'s interpretation of the Act which the Court below failed to find fault with, a careful reading of the agreement on which the Court relied on exclusively in reaching its decision would reveal that Mrs. Jones' signing of the agreement was not fatal to her rights to receive death benefits. First of all, Mrs. Jones was not a party to the third-party settlement. She was only included in the settlement incidentally by those third parties because she was claiming certain damages and losses which have occurred and which will accrue by virtue of the accident to her son. In these circumstances, Mrs. Jones received $5000 not as a trade-off for her future rights to death benefits as the Court below seems to contend, but rather as a present compensation for her losses. The Benefit Review Board concurred with this reasoning when it stated:

> In the instant case, the settlement was entered into prior to death and presumably compensated the employee and mother for loss due to the employee's disability rather than loss due to death.

(App. A).

In saying that it agreed with the statutory interpretation of the B.R.B., the Court below implicitly agreed also with the above reasoning. Yet, for some inexplicable reason, it

failed to follow the only sound basis for adjudicating this controversy.

Secondly, the bulk of the payment—$1,786,839.71, to be exact—due under the agreement went to John Henry Jones, as did the future payments in the amount of $280,000 in annual payments. These annual payments were to be made alternatively to Mrs. Alene Jones, the longshoreman's mother, only in the event that Mr. Jones died prior to December 15, 1986, and then only if Alene Jones were still living at that time. The Agreement provided that in the event Alene Jones did not survive her son, all remaining future payments would revert to John Henry Jones' estate, and not to Mrs. Jones' estate.

Unquestionably, the amounts paid since the death of John Henry Jones were his personal property paid in satisfaction of his claim for personal injury damages against the third party. It thus follows that any amount received after the death of Mrs. Jones accrues to Mrs. Jones not in the form of her own recovery from third party tortfeasors, but in the form of an intervivos request which her son directed that she should receive. Therefore, it was grave error for the Court below to have assumed that the petitioner's signing of this agreement was for her own recovery entitling St. John and INA to credit against an entirely separate death benefit obligation due under the Act.

By crediting the amount Mrs. Jones received by bequest from her son against the death benefits rightly owed to her, the Court below has effectively wiped out Mrs. Jones' entitlement under the Longshore Act. Had the Court considered carefully the B.R.B.'s decision stating that, "lifetime settlement does not overlap with death benefit under § 9, especially as petitioner was not a person

entitled to compensation prior to her son's death," (App. A), it could have reached the right result. But as it stands, no language in the statute mandates such a harsh and drastic result that the Court below arrived at. Not even the language of the contract which the court relies on suggests such a solution. Had the Court below taken a broader view of the problem, it could have observed that the B.R.B. also considered the effect of the agreement in reaching its own decision. Unlike the Court below, the B.R.B. looked at the whole picture rather than a narrow aspect of it.

The Court below hastily observed that Mrs. Jones signed the agreement and received $5000, and that these acts provided the contractual basis for requiring credit against her death benefits. The portion of the contract the Court relied on provides as follows:

> It is further understood and agreed that INA and St. John, in consideration of said sum and future payments, are to receive a credit therefore for accrual of all compensation benefits and medical expenses in the future.

(App. C). In its haste to find that petitioner voluntarily signed a contract, the Court failed to observe that both St. John and INA, who were parties to the agreement, expressly accepted a total of $291,839.71 as reimbursement and in *full satisfaction* of their lien on the amount paid to John Henry Jones pursuant to the LHWCA. (App. C). (Emphasis added.) Nowhere in the contract is there any express mention that the parties contemplated that Mrs. Jones' death benefit was to be included in the "future payments." Neither is there any evidence or suggestion

that Mrs. Jones' recovery was for a claim of wrongful death.

Indeed, the context of the agreement makes obvious the conclusion that the reference to "future payments" was directed not to petitioner's potential recovery of death benefits, but instead to John Henry Jones' certain right to future compensation and medical expenses. The clause specifically provided that the future benefits and expenses, as they accrued, would continue to be credited against the amount of the third party settlement. In the unlikely but possible event that the benefits ever equal the amount of the third party settlement, the credit would be depleted and additional payments would be due by the carrier directly to John Henry Jones. There is no mention of death benefits in the clause, and absent specific mention, there is no reason to conclude as a matter of law that the parties intended that the personal injury recovery would be credited against the potential yet unaccrued death benefits claim.

B. Even Assuming That Petitioner's Participation in the Signing of the Agreement Was the Basis of Requiring Credit, the Amount Recoverable Should Be Limited to $5000.

The contract had contemplated credit only from future payments to John Henry Jones and not his bequest to his mother, Alene Jones. The Court below's finding that Mrs. Jones' signing of the agreement and receipt of $5000 as the basis of liability for credit to St. John and INA is thus misleading.

The implication of the court's reasoning is that had Mrs. Jones not signed the contract or accepted $5000, she

would not have been liable for any credit against her death benefits. It is absurd to contemplate that Mrs. Jones would knowingly agree to defeat her entire right to death benefit entitlement for a meager $5000 or by merely putting her name on the agreement. This simply was not her intention. If the Court below perceived a contractual basis for its decision, it should have also found that there was no meeting of the minds. A traditionally accepted *conditio sine qua non* for the formation of a contract is that there must be a meeting of the minds. If St. John and INA intended the $5000 and signature to represent a granting of credit against petitioner's future death benefits, petitioner only intended such an agreement to compensate her for the immediate losses due to the injury to her son, her only source of income. It is thus apparent that no such contract as the Court below found was intended.

Even assuming arguendo that petitioner's participation was in her capacity as wrongful death beneficiary, such that it entitled St. John and INA to credit, the allowable credit should be limited to $5000, the amount Mrs. Jones received as a result of the settlement, less her expenses and attorney's fees. *See generally Luke v. Petro-Weld, Inc.*, 14 B.R.B.S. 269 (1981); 33 U.S.C. 933(f). To allow an additional credit greater than what Mrs. Jones received would be unfair, and would violate the express provision and purpose of the Longshore Act.

II. THE HOLDING OF THE COURT BELOW THAT PETITIONER, AS BENEFICIARY UNDER THE LHWCA, CONTRACTED AWAY HER RIGHTS TO DEATH BENEFITS, RAISES AN IMPORTANT QUESTION OF LAW WHICH CONFLICTS WITH THE PURPOSE AND EXPRESS PROVISION OF THE ACT, AND THE DECISIONS OF OTHER COURTS OF APPEALS.

By its decision, the Court below has announced a rule under which a worker's recovery of personal injury damages against a third party defendant can be deemed to preclude a statutory beneficiary's right to receive death benefits. This holding raises an important question of law which this Court should resolve because not only does it subvert the purpose and intent of Congress in enacting the Act, particularly §§ 909, 915(b) and 916 of 33 U.S.C., it also produces conflicts in the decision of this Court and other Courts of Appeals.

The paramount intendmentof Congress in enacting § 909 and later enlarging itscoverage in 1972 is to succor the survivors of longshoremen who meet their untimely deaths due to the hazardous nature of their jobs. *See generally Norfolk, Baltimore & Carolina Lines v. Director of Office of Workers' Compensation Programs, U.S. Department of Labor*, 539 F.2d 378 (4th Cir. 1976), cert. den. 429 U.S. 1078, 50 L.Ed. 798, 97 S.Ct. 823 (1977).

To foster this intention of Congress, § 909 as amended, gave two independent reparations, one for injury payable to the employees themselves, and another for relief of their survivors. Hampton Roads Stevedoring Corp. v. O'Hearn.

184 F.2d 76, 79 (4th Cir. 1950). The result reached by the Court below does not square with other Courts of Appeals' recognition of these distinct reparations. *See Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *State Insurance Fund v. Pesce*, 548 F.2d 1112 (2d Cir. 1977); *Norton v. Travellers Ins. Co.*, 105 F.2d 122 (3d Cir. 1939). Neither is it consistent with the well-noted rule of construction recognized by this Court and other Courts of Appeals, including the Fifth Circuit itself, that the Longshore Act or any ambiguity arising thereunder should be liberally construed with the beneficient purpose of the injured workers' protection foremost in mind. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977). *See also Stracken Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

As a practical matter, the decision of the Court below finds no support whatsoever in the decisions of this Court, the express and implied provisions of the LHWC Act, or in its own prior decisions. Not even the cases the Court cited: *Peter v. North River Insurance of Morristown, N.J.*, 764 F.2d 306 (5th Cir. 1985) and *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed. 2d 215 (1980), supports its conclusion that St. John and INA were entitled to credit against Mrs. Jones' death benefit entitlements. In fact, those two cases have no bearing whatsoever on the facts of the case at bar. Resolution by this Court of the conflict which the decision below has produced or threatens to produce is necessary in order to effectuate the intent and purpose of Congress in enacting the LHWC Act, and to restore consistency in the decisions of the Courts of Appeals in this area.

III. EVEN IF THE COURT BELOW WAS CORRECT IN FINDING A CONTRACTUAL BASIS FOR ITS DECISION, SUCH ATTEMPTS TO ARRIVE AT NARROW AND RESTRICTIVE RESULTS SHOULD BE ABANDONED IN FAVOR OF A BROADER STATUTORY CONSTRUCTION.

Although the Court below claimed that it did not disagree with the B.R.B.'s interpretation of the statute, *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d at 400, it nevertheless ignored the express and implied provisions of the Act in arriving at its decision. In place of the statute, the Court below relied on the settlement agreement which Mrs. Jones had signed. While there is a public policy favoring agreements in general, this is not true in the Longshore situations. Agreements are generally disfavored in the Longshore cases. *See generally Du Puy v. Director of Workers' Comp. Prog.*, 519 F.2d 536 (7th Cir. 1975), cert. den. 424 U.S. 965, 47 L.Ed. 2d 732, 96 S.Ct. 1459 (1976); *Lauzon v. Stracken Shipping Co.*, 782 F.2d 1217, 1221 (5th Cir. 1985). *See also* §§ 915(b) and 916 of 33 U.S.C. Section 915(b) provides:

> *No Agreement* by an employee to *waive his rights* to compensation under this Act *shall be valid.*

33 U.S.C. § 915(b) (emphasis added).

Section 916 provides in pertinent parts:

> *No assignment, release,* or commutation of compensation or *benefits due or payable under this* Act, except as provided by this Act, shall be valid.

33 U.S.C. § 916 (emphasis added).

While a contract approach is ordinarily a basis for resolving legal problems, petitioner contends that the approach taken by the Court below is inadequate, given that

Congress had intended that LHWCA exclusively govern conflicts and problems arising in longshore cases. Moreover, this Court has repeatedly held that it will jealously scrutinize private arrangements designed to barter away Federal rights. *Rogers v. Missouri, P.R. Co.,* 352 U.S. 500, 524, 559, 1 L.Ed. 2d 493, 515, 77 S.Ct. 443, 459, 478, reh. den. 353 U.S. 943, 1 L.Ed. 2d 764, 77 S.Ct. 808 (1957); *South Buffalo R. Co. v. Ahearn,* 344 U.S. 367, 97 L.Ed. 395, 73 S.Ct. 340 (1953).

It is apparent that the Court of Appeals below approached the case at bar as if the LHWCA did not apply, despite its claim that it did not disagree with the pertinent provisions in this case. The Court undertook this restrictive contract approach without any showing that this case could not be resolved under the Longshore Act. The mere fact that there were other competing basis for resolving this case does not render the applicable provision of the Act obsolete. To so hold would work untold havoc on the purpose and intent of every statute. If the Court below had taken a broader view which this Court commands in *Northeast Marine Terminal, supra,* it would have been compelled to conclude that Mrs. Alene Jones had made out a prima facie case. Further, the skepticism with which §§ 915(b) and 916 view every advance waiver agreement, at the very least, should have alerted the court that a close scrutiny rather than a liberal was required in the interpretation of the settlement agreement.

Accordingly, therefore, petitioner urges this Court to abandon this restrictive contractual basis adopted by the Court below, and to replace it with the broader interpretation enunciated by the Benefit Review Board which took the totality of the circumstances of this case into consid-

eration and at the same time effectuated the intent of Congress that the LHWCA should govern these types of cases.

IV. THE RULING OF THE COURT BELOW THREATENS SERIOUS INJURY TO THE PETITIONER AS A DEPENDENT MOTHER OF A DECEASED LONGSHOREMAN.

The ruling of the Court below threatens serious injury to the petitioner, a dependent mother of a deceased longshoreman. Mrs. Jones has alleged that this injury flows from the erroneous ruling of the Court below. It is uncontroverted that Mrs. Jones was dependent on her son as her only source of income. If left to stand, the effect of the decision below will wipe out the entire death benefit to which petitioner is entitled as of right. Such a drastic result and injury could hardly have been contemplated by Congress in its efforts to succor the survivors of deceased longshoremen.

Without the intercession of this court, Mrs. Jones would continue to suffer from this gross miscarriage of justice. The decision of the Court below was premised upon a fundamental legal error brought by a purposeful omission to uphold a correct construction of the applicable Longshore statutory provisions. It is, therefore, necessary that this Court intervene in this case in the interest of justice.

———o———

CONCLUSION

Petitioner, Mrs. Jones, has alleged that the Court below committed serious error in ruling that the employer and the carrier were entitled to credit against the death

benefits rightly due her under the LHWCA. The third party settlement agreement which Mrs. Jones signed provides only for a credit against benefits that had accrued to John Henry Jones, and not to a bequest given to Mrs. Jones by her son.

To hold that John Henry Jones' personal injury recovery should be credited against his dependent mother's death benefits would be inconsistent with the express provision of the Longshore Act, subvert the intent and purpose of Congress, and violate the rule of liberal construction enunciated by this Court and other Courts of Appeals. Accordingly, the Supreme Court should take the necessary action to remedy this denial of justice and the threatening chaos confronting the longshore death benefit issue.

WHEREFORE, petitioner, Mrs. Alene C. Jones, prays that the Supreme Court grant this petition for writ of Certiorari and that the decision of the Fifth Circuit Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX A

U.S. DEPARTMENT OF LABOR
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB Nos. 85-316
& 85-316A

ALENE C. JONES (Mother of JOHN HENRY JONES, deceased)	
Claimant-Cross Respondent	
and	
JOHNETTA WILFRED, Minor	FILED AS PART OF
Claimant-Petitioner	THE RECORD
v.	JAN 31 1986
ST. JOHN STEVEDORING COMPANY, INCORPORATED	Linda M. Meekins /RS
and	Clerk of the Board Benefit
INSURANCE COMPANY OF NORTH AMERICA	Review Board
Employer/Carrier-Respondents Cross-Petitioners	DECISION and ORDER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	
Party-in-Interest	

Appeal of the Decision and Order of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

J. Graham Hill and John Roberson (Hill, Parker, Franklin, Cardwell & Jones), Houston, Texas, for claimant Jones.

Theodore M. Haik, Jr., New Iberia, Louisiana, for claimant Wilfred.

King Waters (Vinson & Elkins), Houston, Texas, for employer/carrier.

Karen Kimball (Francis X. Lilly, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, BROWN and McGranery, Administrative Appeals Judges.

PER CURIAM:

Sheryl Wilfred on behalf of her minor daughter Johnetta Wilfred appeals, and St. John Stevedoring Company (employer) cross-appeals, the Decision and Order (83-LHC-1698) of Administrative Law Judge Ben H. Walley awarding benefits to Alene C. Jones, mother of the deceased employee John Henry Jones and denying benefits to claimant Wilfred, on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act).

The parties have stipulated that John Henry Jones sustained an injury on May 27, 1979, in the course and scope of his employment with St. John Stevedoring Company. Prior to his death in December 1981, decedent and his mother, Mrs. Alene Jones, jointly filed and settled a

third-party action for the work related injuries. A final judgement was entered in that case for over $3.5 million in cash and annuities.[1] The decedent died on June 8, 1982, from a myocardial infarction.

On behalf of her minor daughter, Sheryl Wilfred appeals a denial of death benefits, asserting her daughter's entitlement as the illegitimate daughter of deceased employee, John Henry Jones. Based on the provisions of the Louisiana Civil Code, the administrative law judge concluded that a preponderance of the evidence failed to establish the deceased employee's paternity and therefor awarded all death benefits to Mrs. Alene Jones, as mother and sole eligible dependent of the decedent. 33 U.S.C. § 902 (15); 33 U.S.C. § 909. On appeal, the Director and claimant Wilfred contend that the administrative law judge erred in relying on Louisiana law and that Johnetta Wilfred is entitled to death benefits as the acknowledged and dependent illegitimate daughter of decedent under 33 U.S.C. § 902(14).

Employer cross-appeals alleging that Mrs. Jones' participation in the settlement of her injured son's third-party action prior to his death bars further compensation under 33 U.S.C. § 933(g). Alternatively, employer argues that it is entitled to an offset under 33 U.S.C. § 933(f) and therefore does not owe death benefits until the net proceeds of the settlement are exhausted.

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[1] The settlement provided for $1,786,839.71 in cash to the employee and $5,000 to Alene Jones, in addition to yearly payments of $280,000 to the employee commencing December 1982. In the event of the employee's death before December 1986, the annual payments were to continue through that date and be made to Alene Jones, if living, or to the estate of the employee in case of Alene Jones' death.

Oral argument was heard on September 11, 1985, in Houston, Texas, at which time the Board denied claimant Wilfred's Motion to Strike and accepted employer's Response Brief.

The Board's scope of review is limited. If the findings of fact are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement under the Act, an illegitimate child must be both acknowledged and dependent upon the deceased. 33 U.S.C. § 902(14). Relying on *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1305 (5th Cir. 1979), the administrative law judge determined that since the Act does not define the term "acknowledged illegitimate child," the state law of Louisiana, the child's domicile, must apply the meaning of "acknowledged." Based on articles of the Louisiana Code which require either a formal declaration of paternity by the father or mother before two witnesses and a notary public, or a determination of filiation in a civil proceeding instituted by the child within certain time limits, the administrative law judge found that the record evidence failed to meet these requirements.

We agree with the Director and claimant that the administrative law judge erred in applying Louisiana law. As the Board recently held in *Bonds v. Smith & Kelly Co.*, BRBS , BRB No. 81-2519 (August 13, 1985), recourse to state law to define terms not defined in the Act is appropriate only when the term does not have a clear, common meaning and it cannot be easily defined. In *Bonds*, the

Board held that the term "dependency" in Section 2(14) should be defined by reference to its common meaning rather than state law. The term "acknowledged," like "dependent," can be given a clear meaning and there is no reason to turn to restrictive state codes to define this term. A factual determination of whether an illegitimate child is "acknowledged" should be made based on its plain common meaning and relevant federal case law based on the record evidence. *See Texas Employer Insurance Association v. Shea,* 410 F.2d 56 (5th Cir. 1969)(Under Section 2(14) of the Act, ". . . acknowledgment of paternity does not require a notary's seal or any other ritualistic proclamation. . .").

In the instant case, the evidence overwhelmingly supports a finding of acknowledgement. The evidence regarding acknowledgement includes the sworn deposition of decedent dated June 30, 1981, wherein decedent publicly acknowledged the illegitimate child as his.[2] The record also contains decedent's Last Will and Testament in which he lists claimant Wilfred as a potential beneficiary along with decedent's brothers and sisters, and a memorial service sheet and obituary prepared by decedent's sister which refers to decedent's paternity. Additionally, the record

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[2] Employer contends that decedent's deposition in the third-party claim was inadmissible at the formal hearing under the Federal Rules of Evidence. Although employer attended the deposition, it contends it had no motive to develop testimony adverse to this claim at that time. We reject this contention since administrative law judges are not bound by the formal rules of evidence, 33 U.S.C. § 923(a), 20 C.F.R. § 702.339, *Darnell v. Bell Helicopter International, Inc.,* 16 BRBS 98 (1984). Additionally, employer had ample opportunity to protect its interest by developing evidence in the proceedings below.

includes the testimony of the mother, Sheryl Wilfred, at the formal hearing acknowledging the decedent as the father of her child, and testifying as to the time and place of conception. There is nothing in the record to suggest that claimant is not decedent's daughter. Since the evidence is clear, uncontradicted, and allows no other possible result, we find claimant Wilfred acknowledged under Section 2(14) as a matter of law.[3]

With regard to the question of dependency, Sheryl Wilfred testified that she depended on her mother and decedent for her support and that decedent would give money on a regular basis. Similar testimony was provided by decedent's sister, Frances Ray, and the witness Flo ita Jacquet. As claimant correctly argues, however, the administrative law judge failed to make a factual inquiry as to dependency because he found the acknowledgment issue dispositive. The uncontradicted testimony of all the witnesses nevertheless establishes that the child's mother relied on regular contributions of substantial sums of money from decedent. Accordingly, we reverse the ad-

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[3] We additionally note that our disposition of this case would appear to be the same even under an application of Louisiana law. Article 203 of the Louisiana Civil Code provides one method of establishing filiation of an illegitimate child:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of the such child.

La. C.C. Art. 203. Decedent's deposition testimony was taken by a certified shorthand reporter and notary public before four witnesses. It would appear that his testimony suffices as a declaration publicly acknowledging the illegitimate child in the instant case for purposes of Article 203.

ministrative law judge's finding that claimant Wilfred is not decedent's "child" under Section 2(14) and hold that she has established acknowledgement and dependency as a matter of law. Claimant Wilfred is therefore entitled to benefits under the Act equal to 50 percent of decedent's average weekly wage plus adjustments pursuant to 33 U.S.C. § 910(f).

Regarding claimant Alene C. Jones, employer raises two issues in its cross-appeal. First, employer contends that Mrs. Jones' participation in the settlement of the third-party action bars death benefits under Section 33(g), 33 U.S.C.A. § 933(g) (West Supp. 1985), since no written approval was timely filed.[4] Second, employer contends that

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[4] Section 33(g), as amended in 1984 provides:

"(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

"(2) if no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C.A. § 933(g) (West Supp. 1985).

it is entitled to offset under Section 33(f) and therefore does not owe death benefits to claimant until the net proceeds of the settlement are exhausted.

We hold that Section 33(g) is not applicable in the instant case. Due to the size of Mrs. Jones' portion of the settlement ($5,000 in cash and $280,000 per year annuity from December 1982, through December 1986), it would be impossible for the death benefits to *exceed* the settlement amount.[5] Section 33(g) explicitly requires that the settlement be for an amount *less* than employer's liability for benefits. Since recovery beyond the settlement is impossible, Section 33(g) is not in controversy. Additionally, *the written approval requirement of Section 33(g)(1) is inapplicable because the employee was not yet dead at time of the settlement and Mrs. Jones was thus not receiving death benefits from employer at the time of settlement. She was therefore not "entitled to compensation" within the meaning of Section 33(g)(1). See generally Dorsey v. Cooper Stevedoring Co., Inc.,* BRBS , BRB No. 82-827 *(Jan. 27, 1985). It would be absurd to require the mother to obtain Section 33(g)(1) approval so as to retain her right to death benefits where the employee is not dead.*

*Finally, regarding the offset issue, Section 33(f) pro*vides that:

> If the person *entitled to compensation* institutes proceedings within the period prescribed in section 33(b),

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[5] Section 9(d) provides for payment of 25 percent of the average weekly wage for a parent. Since we hold that the child also prevails, this would diminish to 126.6 percent of the average weekly wage. *See* 33 U.S.C. § 909(c), (d). The average weekly wage in this case is $200. This results in a compensation rate of no more than a few thousand dollars a year.

> the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C.A. § 933(f) (West Supp. 1985) (emphasis added). As the administrative law judge did not consider this issue, he did not provide for an offset.

In the instant case, the settlement was entered into prior to death and presumably compensated the employee and mother for loss due to the employee's disability, rather than loss due to his death. Thus, the lifetime settlement does not overlap with death benefits under Section 9. This factor is especially significant since, as discussed above, claimant was not a "person entitled to compensation" prior to decedent's death. We therefore hold that employer is not entitled to offset against the mother's third-party settlement under Section 33(f).

Accordingly, the administrative law judge's denial of benefits to claimant Wilfred is reversed. The award is modified to provide for recalculation of compensation benefits for claimants Jones and Wilfred under Section 9 consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

/s/ Robert L. Ramsey,
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ James F. Brown,
JAMES F. BROWN
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

Dated this 31st day
of January 1986

APPENDIX B

U.S. Department of Labor (SEAL)

Office of Administrative Law Judges
Suite 901, 1001 Howard Avenue
New Orleans, LA 70113

In the Matter of	)	
JOHN HENRY JONES (DECEASED) MRS. A. C. JONES (MOTHER) ET AL	)	
Claimants	)	Case No. 83-LHC-1698
against	)	OWCP No. 8-53831
ST. JOHN STEVEDORING CO. INC.	)	
Employer	)	(Filed May 20, 1985)
INSURANCE COMPANY OF NORTH AMERICA	)	
Carrier	)	

J. Graham Hill, Esquire
For the Claimant, Mrs. A. C. Jones

Ted Haik, Jr., Esquire and Richard I. Haik, Esquire
For the Claimant, Johnetta Wilfred

King Waters, Esquire
for the Employer/Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for death benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, *et. seq.* (hereinafter referred to as either LHWCA or the Act), which claim is based on the death of John H. Jones, deceased (hereinafter referred to as the decedent), filed by his mother Mrs. Alene C. Jones; Sheryl Wilfred filed a separate claim on behalf of Johnetta Wilfred, decedent's alleged daughter. Prior to his death, the decedent filed a claim for compensation as a result of an injury which occurred on May 17, 1979, while in the course and scope of his employment with St. John Stevedoring Co., Inc. (hereinafter referred to as the Employer), with a hearing held on December 15, 1982. The Employer is insured by Insurance Company of North America (hereinafter referred to as the Carrier).

An issue arose of the eligibility and dependency of the claiming mother and alleged minor daughter that could not be resolved administratively and the cause was referred to this office for a formal hearing. A hearing in this matter was held before an Administrative Law Judge on November 28, 1983, in Houston, Texas. The individual parties and their diverse interests are identified as follows:

1. Mrs. Alene C. Jones, Claimant, mother of the decedent, and her attorney;

2. Sheryl Wilfred, on behalf of her minor daughter, Johnetta Wilfred, claimant, and her attorneys;

3. St. John Stevedoring Co., Inc., and Insurance Company of North America, and their attorney, and a company representative of the insurance company.

Preliminary Matter

Counsel for Respondents has objected to the admissibility of certain evidentiary documents. At the formal hearing, counsel for Claimant Johnetta Wilfred offered into evidence a deposition taken of the decedent pertaining to a third party claim which he had filed. Both at formal hearing and subsequently in a brief submitted to this Court, counsel for Respondents objected to the introduction of any of decedent's deposition testimony rendered in connection with the third party claim. Under the provisions of 5 U.S.C. 554 and the regulations issued thereunder, I conclude that the deposition testimony of decedent, John H. Jones, is relevant and material to the matter at issue and is therefore received into evidence. 20 C.F.R. § 702.338.

Findings of Fact and Conclusions of Law

At the outset of the hearing, inquiry was made of the parties and they responded by announcing agreement on certain material facts and dictated them into the record, which are as follows:

Stipulations

1. The named employee is John Henry Jones;

2. The date of injury was May 27, 1979;

3. The injury to decedent occurred in the course and scope of his employment with St. John Stevedoring Co., Inc.;

4. The decedent's employer was St. John Stevedoring Co., Inc.;

5. The employer had statutory notice of the injury;

6. At the time of injury, John H. Jones' average weekly wage was $200.00;

7. The LHWCA applies to this proceeding;

8. The decedent died on June 8, 1982, and that on the date of his injury and on the date of his death, Mrs. A. C. Jones, decedent's mother, was economically dependent on him;

9. Mrs. A. C. Jones was the natural mother of John H. Jones;

10. Prior to the death of John H. Jones, a third party action was filed and settled. A release and settlement agreement was executed, and a final judgment was entered in that case;

11. A funeral bill in excess of $1,000.00 in reasonable and necessary funeral expenses was incurred, and the funeral expenses were paid out of the estate of the decedent;

12. All compensation benefits until the time of John H. Jones' death had been paid according to law. The employer was fully reimbursed as a result of the third party settlement.

The parties all agreed to the foregoing stipulations and I accept them as facts in this case. Since it has been stipulated that Mrs. A.C. Jones, Claimant, was economically dependent on the decedent, i.e. Claimant Mrs. Jones looked to and relied upon the contributions of the decedent/employee in whole or in part as a means of maintaining and supporting herself in accordance with the accustomed mode of life, I find Claimant, Mrs. Jones, entitled to an award of death benefits under the provisions of the Act. (33 U.S.C. § 902(15)).

Issue

Based on the foregoing facts of record, stipulations, and the evidence presented by the parties, both testimony and

depositions of witnesses and their documentary evidence and exhibits, I find and conclude that the singular issue before me is whether Johnetta Wilfred, Claimant herein, was a legal dependent, and is therefore eligible for death benefits under Section 9 of the Act (33 U.S.C. § 909).

In order to establish entitlement to benefits, it is necessary to determine whether the Claimant Johnetta Wilfred qualifies as a "child" as defined by Section 902(14) of the LHWCA as follows:

> "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," "sister" include only persons who at the time of death of the deceased employee are under eighteen years of age. 33 U.S.C. § 902(14).

The definition of the term "child" includes an "acknowledge[d] illegitimate child dependent on the deceased. . . ." *Ingalls Shipbuilding Corporation v. Neuman,* 448 F.2d 773 (5th Cir. 1971), aff'g, 322 F. Supp. 1229 (S.D. Miss. 1970). Since the LHWCA does not define the term "acknowledged illegitimate child," the applicable state law of persons must supply its meaning. See *Ryan-Walsh Stevedoring Company, Inc. v. Trainer,* 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979).

After determining which state law governs, it can then be decided whether Johnetta Wilfred is an "acknowledged

illegitimate child'' and thus falls within the purview of the Act's covereage.

The Proper Local Forum

To determine whether a Claimant is decendent's ''child,'' state law is dispositive because the LHWCA does not define this operative term. *Ellis v. Henderson,* 204 F.2d 173 (5th Cir.), cert. denied, 346 U.S. 873 (1953). The facts of record identifying events in two states, Texas and Louisiana, indicate that either may be the proper jurisdictional forum for resolving the issue in the instant case.

Because there is no federal law of persons, the law of Louisiana which is the state of the child's domicile, should be applied to determine the status of Johnetta Wilfred under the Act. *Texas Employers Insurance Association v. Shea,* 410 F.2d 56 (5th Cir. 1969); *Murphy v. Houma Well Service,* 409 F.2d 804 (5th Cir. 1969).

Therefore, based on the foregoing, I find and conclude that the proper forum to determine the issue before me of the legal status of Claimant Johnetta Wilfred is Louisiana. See La. C. Civ. P. Art 10 A(8); cf. *Daily v. Hough,* 369 So.2d 1182 (La. App. Cir. 1979), writ denied, 369 So.2d 1378.

Having concluded that the facts of this case must be measured according to the Louisiana Civil Code, what is the legal status of the Claimant, Johnetta Wilfred, in order to qualify for LHWCA death benefits?

Legal Status of Johnetta Wilfred

The evidence of record indicates that the decedent and Sherryl Wilfred, mother of Claimant Johnetta Wil-

fred, maintained a relationship from April 1978 until December 1978. Ms. Wilfred testified at the hearing that during that time she occasionally had sexual intercourse with decedent when they visited either in Texas or in Louisiana. Ms. Wilfred further testified that the child, Johnetta Wilfred, was conceived in Louisiana in December 1978. Ms. Wilfred stated she continued to see John H. Jones until the date of his injury in Texas in May 1979. Johnetta Wilfred was born on October 4, 1979 in Louisiana.

Testimony rendered at the hearing by witnesses for both Claimants established that Ms. Wilfred received money orders from John H. Jones sent periodically from Texas to Louisiana both before and after Johnetta Wilfred was born. The amount of the money orders varied from $80.00 to $100.00, as did the times the money orders were sent, from two weeks to several months apart.

John H. Jones died in Texas in June 1982. His will was probated in Texas Civil Court.

Under the laws of Louisiana, authority for the acknowledged illegitimate child doctrine is derived from the Louisiana Civil Code. There exists two methods of establishing the paternity of an illegitimate child. Article 203 of the Louisiana Civil Code provides:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of such child.

Article 208 of the Code states the requirements for proving filiation (paternity) of an illegitimate child:

A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.

B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.

C. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.

D. The right to bring this proceeding is heritable.

In *In re Martin,* 347 So. 2d 893 (La. App. 1st Cir. 1978), a Louisiana appellate court explained the burden of proof and sufficiency of the evidence required to constitute an acknowledgment under La. C.C. Art. 203.

According to the facts set forth in *Martin,* supra, the alleged father's name was listed on the birth certificate with no objection on his part; the claimed natural parents were living together at the time of the illegitimate child's birth; and the alleged natural father admitted that the child was his. After the appellate court examined La. C.C. Art. 203 and the applicable caselaw, the court concluded that the facts presented were not sufficient to

constitute an acknowledgment under La. C.C. Art. 203. The appellate court found that although the alleged natural father's name appeared on the birth certificate, it was established that someone other than the alleged father had placed the name in the birth records of the child. Furthermore, there is no contention that he signed it. The court also considered the admission and failure to protest by the alleged father. However, the court found these circumstances to be insufficient to meet the standard. The court reasoned: "[T]he code speaks in terms of acknowledgment being made in the 'registering of the birth.' * * * * See *Allen v. Anderson,* 55 So. 2d 596 (Orl. La. App. 1951)."

In a related case, *Boudreaux v. Matt,* 370 So. 2d 139 (La. App. 3rd Cir. 1979), that Louisiana appellate court discussed the legal consequences of evidence presented to establish acknowledgment. The court held that the plaintiff therein failed to establish that it was more probable than not that the alleged natural father was responsible for the child's conception, i.e., the burden of proof ordinarily required to establish an issue of fact. The court concluded that the evidence in that case failed to prove that the child was actually the illegitimate child of the alleged father or that plaintiff established paternity for the purposes of a claim for any of the rights given by law regarding parent and child.

This same Louisiana appellate court, the Third Circuit, considered theburden of proof required for a paternity action in *Fontenot v. Thierry,* 422 So. 2d 586 (La. App. 3rd Cir. 1982), writ denied, 427 So. 2d 868 (La. 1983). The court outlined the sufficient basis required to determine the paternity claim, i.e. by a preponderance of the

evidence. Other appellate courts in Louisiana have interpreted this evidentiary standard strictly, placing it as an ultimate issue of fact unless it is established with reasonable certainty that all other alternatives are impossible. *IMC Exploration Company and The Petroleum Corporation of America v. Foster Henderson,* 419 So. 2d 490 (La. App. 2d Cir. 1982), writ denied, 423 So. 2d 1149 (LA 1982), reconsideration denied, 427 So. 2d 866 (La. 1983).

The evidence presented by the parties at the hearing failed to establish by a preponderance of the evidence the paternity of Johnetta Wilfred. The deposition of decedent admitted into evidence contained information that he believed himself to be the natural father of Johnetta Wilfred. However, this does not quality as a declaration of acknowledgement under the provisions of La. C.C. Art 203. Furthermore, the terms of decedent's will, also admitted into evidence, do not contain any provisions which would serve to recognize Johnetta Wilfred as his acknowledged illegitimate daughter. Finally, no records were introduced into evidence before this Court which demonstrated that a timely civil proceeding had ever been instituted which established the child's filiation according to the terms of La. C.C. Art. 208.

Based upon the standard set forth according to the provisions of the Louisiana Civil Code, it is my conclusion that there has been no substantial proof of paternity in the instant case; it has not been definitively established that the decedent was the natural father of Johnetta Wilfred.

Therefore, all death benefits should be paid to the eligible dependent Mrs. A. C. Jones, mother of the decedent, and said benefits should be paid to her in the

amount and for the full time of her eligibility to receive said benefits according to the terms and provisions of the Act.

ORDER

IT IS THEREFORE ORDERED:

1. That the claim of Johnetta Wilfred, brought on her behalf by her natural mother, be and it is hereby DENIED; and

2. The Employer/Carrier shall pay unto Mrs. A. C. Jones, decedent's mother, the death benefits as provided by Section 9 of the Act, in the amount and for the time of her respective eligibility as provided by the Act (33 U.S.C. Section 901, et seq.); based on an average weekly wage of $200.00;

3. The Employer/Carrier shall pay to Claimant Mrs. A. C. Jones interest computed in accordance with 28 U.S.C. § 1961 on each past due installment of death benefits until paid, to be computed by the Deputy Commissioner;

4. The Employer/Carrier shall pay the estate of John H. Jones $1,000.00 for reasonable funeral expenses pursuant to Section 9(2) of the Act; and

5. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

/s/ Ben H. Walley
BEN H. WALLEY
Administrative Law Judge

Dated: December 18, 1984
New Orleans, Louisiana

BHW:br
B/3

CERTIFICATE OF FILING AND SERVICE

I certify that on January 3, 1985 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Eighth District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mrs. A. C. Jones; 1009 Old Millcreek Rd.; Brenham, TX 77833
Claimant

J. Graham Hill, atty; 1400 Texas Commerce Bldg.; Houston, TX 77002
Johnetta Rene Wilfred; 811 Edna St.; New Iberia, LA 70560

Theodore M. Haik, Jr., atty; P O Box 817; New Iberia, LA 70560
Insurance Carrier or Employer (if self-insured)

Insurance Co. of North America; P O Box 759; Houston, TX 77002
St. John Stevedores; P O Box 1566; Mobile, AL 36633
King Waters, atty; 3110 First City Tower; Houston, TX 77002

*DECISION AND ORDER dated December 18, 1984

A copy was also mailed by regular mail to the following:

Judge Ben H. Walley, Office of Administrative Law Judges, U. S. Department of Labor, Suite 901, 1001 Howard Ave, New Orleans, LA 70113

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D. C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA)

U. S. Department of Labor, Washington, D. C. 20211

/s/ James T. Smith
Deputy Commissioner
EIGHTH Compensation District
U. S. Department of Labor

EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs

Form LS-19
Rev. Aug. 1975

APPENDIX C

No. 79-50731

JOHN HENRY JONES	X	IN THE DISTRICT
	X	COURT OF HARRIS
vs.	X	COUNTY, TEXAS
	X	
AMERICAN RICE, INC.,	X	133RD DISTRICT
ET AL	X	COURT

RELEASE AND SETTLEMENT AGREEMENT

This agreement is made and entered into by John Henry Jones and his mother, Alene Jones (each of whom will sometimes hereinafter be referred to as "plaintiff"), American Rice, Inc. (sometimes hereinafter referred to as ARI), Cargill, Inc., (sometimes hereinafter referred to as "Cargill"), Agricor, Inc. and CIE Noga d'Importation et d'Exportation S.A. (sometimes hereinafter referred to collectively as "Agricor/Noga"), the Insurance Company of North America (sometimes hereinafter referred to as "INA"), and St. John Stevedoring Company, Inc. (sometimes hereinafter referred to as "St. John").

WITNESSETH:

Whereas, plaintiff, John Henry Jones, has asserted certain causes of action against ARI, Cargill, and Agricor/Noga, resulting from an occurrence on or about May 17, 1979; and

Whereas, plaintiff, John Henry Jones, has brought suit against ARI, Cargill, and Agricor/Noga, such suit being cause number 79-50731, styled John Henry Jones v. American Rice, Inc., Agricor, Inc., CIE Noga d'Importation et d'Exportation S.A., and Cargill, Inc., pending in

the 133rd Judicial District Court of Harris County, Texas, alleging that plaintiff received and will continue to receive certain damages and losses as a result of the above described accident; and

Whereas, INA and St. John have intervened in the cause of action filed by John Henry Jones seeking recovery of certain sums paid to and on behalf of John Henry Jones as a result of such occurrence; and

Whereas, plaintiff, Alene Jones, although not a party to the above styled and numbered cause of action, is claiming certain damages and losses which have accrued and which will accrue by virtue of the accident made the basis of such cause of action; and

Whereas, all parties to this agreement, and each of them, desire to avoid the vexation and expense involved in a protracted trial of this highly disputed claim now asserted by plaintiffs and further desire to amicably compromise, settle, and dispose of all possible claims which plaintiffs have asserted or which could have been asserted against ARI, Cargill, or Agricor/Noga, and to limit the further substantial expense of litigation by any of the parties hereto;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS THAT:

John Henry Jones and Alene Jones, for and in consideration of the following:

1. The sum of $1,786,839.71 cash (hereinafter referred to as "Said Sum") in hand paid to John Henry Jones by and on behalf of ARI, Cargill, and Agricor/Noga, each of which has contributed

the following toward the total amount of Said sum:

a. ARI $1,556,839.71

b. Cargill $ 200,000.00

c. Agricor/Noga, jointly $ 30,000.00;

2. The sum of $5,000.00 cash in hand paid to Alene Jones by and on behalf of ARI; and

3. The agreement on behalf of ARI and its insurors to make Future Payments as described below (heretinafter referred to as the "Future Payments");

the sufficiency of all of which is hereby confessed and acknowledged, for themselves, their heirs, executors, administrators, assigns, next of kin, or other legal representatives, do hereby RELEASE, ACQUIT, AND FOREVER DISCHARGE American Rice, Inc., Cargill, Inc., Agricor, Inc., CIE Noga d'Importation et d'Exportation S.A., their liability insurance carriers, affiliates, subsidiaries, parent corporations, successors in interest, each of their respective agents, servants, and employees, and representatives, whether specifically mentioned herein or not, and any other person or party (hereinafter collectively referred to as "Releasees"), of and from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses, including, but not limited to, any cause of action on account of or in any way growing out of the personal injuries received by John Henry Jones by virtue of the occurrence of May 17, 1979, including damages pursuant to Article 4671, Texas Revised Civil Statutes, Article 5525, Texas Revised Civil Statutes, or any similar statute of any other state or governmental unit, whether such damages and injuries have already accrued

or will accrue in the future. All claims against persons or parties whether or not specifically released herein are hereby assigned by plaintiffs to the Releasees.

For the same consideration hereinabove stated, plaintiffs, for themselves, their heirs, executors, administrators, assigns, next of kin, or other legal representatives do hereby agree to indemnify and hold harmless Releasees from any and all claims, demands, rights, action or causes of action which may be asserted by any Worker's Compensation Carrier or self-insured, employer liability insurance carrier, medical insurance carrier, or any other person or party, by virtue of any payment made to plaintiffs or to a third-party on their behalf, by any of their kin, or by any person for whom they may act as guardian, representative, administrator, executor, personal representative, or in any other representative capacity, by reason of the occurrence of May 17, 1979, whether said claims by said parties arise by virtue of statutory indemnification, subrogation, common law right, or a claimed right by statute to damages because of the injuries received by John Henry Jones or his death if death should result from such injuries.

It is understood and agreed that the Said Sum and Future Payments are in full and complete satisfaction of any and all claims which Plaintiffs have relating to said accident, injuries to and death of John Henry Jones, or damages claimed by said undersigned or any member of their family, or any of their kin, or any person, and that this release is intended to and does fully release all such claims.

It is further understood and agreed that the Future Payments referred to above are to be made by ARI and

Puritan Insurance Company, one of the insurors of American Rice, Inc., as follows:

> To plaintiff John Henry Jones the sum of $280,000.00 shall be paid annually. The first such payment will be made on December 15, 1982, and such payments will continue throughout the life of John Henry Jones; provided, however, that in the event John Henry Jones shall die before December 15, 1986, the annual payments shall continue through that date and shall be made to his mother, Alene Jones, if living, or to the estate of John Henry Jones in the event Alene Jones shall die before December 15, 1986. All annual payments shall be due on the 15th day of December in the year due. In no event shall such guaranteed annual payments be accelerated.

It is understood and agreed that ARI and Puritan Insurance Company may cause Future Payments to be made as described above by purchasing and owning an "annuity contract" from First Colony Life Insurance Company which company will make payments directly to the plaintiffs. It is further understood and agreed that the annuity contract purchased to make the Future Payments will be purchased, owned, and held by ARI or the Puritan Insurance Company and that plaintiffs acquire no ownership interest in the said annuity contract, and that all payments from or on behalf of ARI and Puritan Insurance Company (including any payments under any annuity contract purchased by Puritan Insurance Company) are being made because of the damages sustained by the plaintiffs as the result of the above described accident, and the continuing and ongoing damages that will be suffered and sustained by the plaintiffs in the future.

It is further understood and agreed that this release and settlement of claim extends to and includes the afore-

said cause number 79-50731, styled John Henry Jones v. American Rice, Inc., Agricor, Inc., CIE Noga d'Importation et d'Exportation S.A. and Cargill, Inc., and that a take-nothing judgment will be entered as to the plaintiffs and that courts costs will be assessed against the defendants.

It is further understood and agreed that by the payment of Said Sum and the Future Payments (or the purchase of any annuity contract to make Future Payments), and the payment of the costs herein recited, Releases do not admit liability of any sort whatsoever, and have made no representations as to liability, and have made no agreements or promises to do or omit to do any act or thing not specifically setforth herein.

It is further understood and agreed that this release and settlement of claims is binding upon the heirs, executors, administrators, assigns, and legal representatives of plaintiffs and that it extends to the successors, assigns, and legal representatives of Releasees.

It is further understood and agreed that of and from the first money received by the plaintiff, John Henry Jones, the sum of $291,839.71 shall be paid to the Insurance Company of North America and to their insured, St. John Stevedoring Company, Inc. in satisfaction of the amounts heretofore paid by them to and on behalf of John Henry Jones pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Sec. 901, et seq. which sum the Insurance Company of North America and St. John Stevedoring Company have agreed to accept in full satisfaction of their lien pursuant to such Act. Both INA and St. John have expressly approved this settlement

as required by the Longshoremen's and Harbor Worker's Compensation Act.

It is further understood and agreed that INA and St. John, in consideration for Said Sum and Future Payments, are to receive a credit therefor for accrual of all compensation benefits and medical expenses in the future.

All payments called for in this agreement, other than the Future Payments set out above as defined, are due on December 15, 1981. Any payment called for in this agreement, including Future Payments, not made within five (5) days of the due date shall bear interest at the legal rate from the due date due until the date of payment.

It is further understood and agreed that this release and settlement of claims is to be construed and interpreted under the laws of the State of Texas.

It is further understood and agreed that each of the plaintiffs is represented by attorneys of his or her own chosing, Mr. J. Graham Hill and Mr. Ron Franklin, of Houston, Texas, and that in making this settlement each of the plaintiffs relies wholly upon his or her own judgment, belief, and knowledge of the nature and the extent of the injuries sustained and the disabilities and damages resulting therefrom, and no representations or statements made about the matter by any attorney, doctor, agent or representative of the Releasees have influenced either of the plaintiffs, in whole or in part, to make this statement and to execute this release.

X John Henry Jones
—

/s/ Alene C. Jones
Alene Jones

HILL & PARKER

/s/ J. Graham Hill
By: J. Graham Hill
Attorney for Plaintiff
Texas Bar Assoc. #09644500
1400 Texas Commerce Building
Houston, Texas 77002
(713) 229-0643

/s/ John M. Collins
Manager (Office)
Insurance Company of North America

/s/ Thomas A. Gangle
Vice President (Office)
St. John Stevedoring Company

STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared John Henry Jones, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office this 21 day of December, 1981.

/s/ J. Graham Hill
Notary Public in and for
Harris County, Texas

My commission expires:
1-30-85

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority on this day personally appeared Alene Jones, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office this 21 day of December, 1981.

/s/ J. Graham Hill
Notary Public in and for
Harris County, Texas

My commission expires:
1-30-85

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared John M. Collins, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of the said Insurance Company of North America, a corporation, and that he executed the same as the act of such corporation for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office this 29th day of December, 1981.

/s/ Raenelle Barefoot
Notary Public in and for
Harris County, Texas

My commission expires:
6-30-84

THE STATE OF ALABAMA)
)
COUNTY OF MOBILE)

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Thomas A. Gangle, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of the said St. John Stevedoring Company, a corporation, and that he executed the same as the act of such corporation for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office this 23rd day of December, 1981.

/s/ Illegible
Notary Public in and for
Mobile County, Alabama

My commission expires March 30, 1982

NO. 79-50731

86-4170

JOHN HENRY JONES	)	IN THE DISTRICT
	)	COURT OF HARRIS
vs.	)	COUNTY, TEXAS
	)	133RD DISTRICT
AMERICAN RICE, INC.,	)	COURT
ET AL	)	

FINAL JUDGMENT

On the 13th day of November, 1981, plaintiff John Henry Jones; defendants, American Rice, Inc., Agricor, Inc./CIE Noga d'Importation et d'Exportation S.A. and Cargill, Inc.; and intervenors Insurance Company of North America and St. John Stevedoring Company, Inc., appeared herein by and through their attorneys of record and announced to the court that a compromise and settlement agreement had been reached, the terms of which are set out in Exhibit A attached hereto and requested that judgment be entered according to the terms of such agreement, taxing the costs against defendants. The court is of the opinion that judgment should be entered in accordance with the wishes of the parties.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The compromise and settlement agreement attached hereto as Exhibit A is approved in all things and the terms and conditions of such agreement are adopted in this judgment as is fully set forth herein.

2. All costs of court shall be taxed as follows:

American Rice, Inc.	93%
Cargill, Inc.	6%
Agricor, Inc. and CIE Noga d'Importation et d'Exportation S.A.	1%

3. All cross-actions and counter-suits are dismissed to the extent the relief requested in same is not herein above expressly granted.

4. All relief sought herein or which could have been sought herein not granted by this judgment is denied.

SIGNED this 17 day of February, 1982.

/s/ David Hittner
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:

HILL & PARKER

/s/ Mr. J. Graham Hill
Attorney for Plaintiff, John Henry Jones
Texas Bar Assoc. # 09644500
1400 Texas Commerce Building
Houston, Texas 77002
229-0643

HINDS & MEYER

/s/ John Meyer
Attorney for Defendant, American Rice, Inc.
Texas Bar Assoc. # 13993000
200 Plaza Level—LNG Tower
2919 Allen Parkway
Houston, Texas 77019
523-6717

BROWN, SIMS & AYRE

/s/ Mr. G. Bryon Sims
Attorney for Defendant, Agricor, Inc./CIE Noga d'Importation et d'Exportation S.A.
Texas Bar Assoc. # 18419000
2000 Post Oak Boulevard, Suite 1735
Houston, Texas 77056
629-1580

/s/ Ronald E. Cook
Attorney for Defendant, Cargill, Inc.
Texas Bar Assoc. # 04744800
3000 One Shell Plaza
Houston, Texas 77002
229-1692

VINSON & ELKINS

/s/ G. Wesley Urquhart
Attorney for Intervenors, Insurance
Company of North America
Texas Bar Assoc. # 20415575
1935 First City National Bank Building
Houston, Texas 77002
651-2766

87 381

Supreme Court, U.S.
FILED
SEP 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

In The

Supreme Court of the United States

October Term, 1987

ALENE C. JONES

Petitioner

v.

ST. JOHN STEVEDORING COMPANY, INC.
Employer, and
INSURANCE COMPANY OF AMERICA,
Carrier

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

CHARLES R. PARKER
HILL, PARKER, FRANKLIN,
CARDWELL & JONES
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Attorneys for Petitioner,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4170

ST. JOHN STEVEDORING CO., INC.
and INSURANCE COMPANY OF
NORTH AMERICA,

Petitioners,

versus

JOHNETTA WILFRED, ALENE C.
JONES and DIRECTOR, OFFICE
OF WORKERS COMPENSATION PROGRAMS,

Respondents.

Petitions for Review of an Order of the
Benefits Review Board

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion JUNE 3, 1987, 5 Cir., 198....., ...F.2d.....)

(July 1, 1987)

Before GEE, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Pro-

cedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

REHG-7

S.A. 3

ST. JOHN STEVEDORING CO., INC.,
Employer, and Insurance Company of
North America, Carrier, Petitioners,

v.

Johnetta WILFRED, Alene C. Jones,
and Director, OWCP, Respondents.

No. 86-4170.

United States Court of Appeals,
Fifth Circuit.

June 3, 1987.

Deceased worker's mother and minor daughter brought action to recover death benefits under Longshore and Harbor Workers' Compensation Act. The Benefits Review Board awarded benefits, and employer and compensation carrier petitioned for review. The Court of Appeals, Politz, Circuit Judge, held that: (1) illegitimate daughter was both "child" and dependent of deceased worker; (2) worker's mother contractually agreed, in worker's tort action settlement agreement, to give employer and carrier credit for future compensation benefits; and (3) worker did not have power to settle or waive in advance any death benefits that might accrue to his minor daughter.

Petition denied in part and granted in part.

King Waters, Houston, Tex., for petitioners.

Theodore M. Haik, Jr., New Iberia, La., John Roberson, Graham Hill, Houston, Tex., for respondents.

Karen Kimball, Atty., U.S. Dept. of Labor, Office of Sol., Benefits Review Bd., U.S. Dept. of Labor, Linda M. Meekins, Clerk, Washington, D.C., for other interested parties.

Petition for Review of an Order of the Benefits Review Board.

Before GEE, POLITZ, and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

St. John Stevedoring Company, Inc. and Insurance Company of North America (INA) petition for review of a decision by the Benefits Review Board (BRB) awarding Longshore and Harbor Workers' Compensation Act (LHWCA, 33 U.S.C. §§ 901-950) death benefits to Alene C. Jones and Johnetta Rene Wilfred, mother and daughter, respectively, of John Henry Jones, the deceased worker. We deny review as relates to Johnetta Rene Wilfred but grant same as respects Alene C. Jones, finding that the benefits due her are subject to a credit, as discussed herein.

Background

On May 27, 1979, John Henry Jones sustained severe injuries during the course and scope of his employment by St. John Stevedoring. By December 23, 1981 he had received LHWCA compensation benefits from his employer totaling $291,839.71. On that date, he executed a compromise settlement agreement with the parties against whom he had filed an *ex delicto* action. St. John Stevedoring and INA had intervened in Jones's tort suit, seeking recovery for compensatory benefits.

The settlement agreement was executed by John Henry Jones, Alene C. Jones, the several tort defendants, St. John Stevedoring, and INA. The agreement provided for an immediate payment to John Henry Jones of $1,786,-

839.71, which included the sum due St. John Stevedoring and INA for past compensation benefits, plus $5,000 to Alene C. Jones, and, finally, $280,000 per year to John Henry Jones, for the balance of his life, providing that in the event he died before five annual payments were made, the remainder of those five payments would be made to Alene C. Jones, if she survived him, or to his estate, if she predeceased him. The agreement included a release of the tort-suit defendants and their insurers, a hold-harmless provision and, *inter alia*, the following:

> It is further understood and agreed that INA and St. John, in consideration for Said Sum and Future Payments, are to receive a credit therefor for accrual of all compensation benefits and medical expenses in the future.

The release recited that the sums paid and to be paid were received

> in full and complete satisfaction of any and all claims which [John Henry Jones & Alene C. Jones] have relating to said accident, injuries to and death of John Henry Jones, or damages claimed by said undersigned . . . and that this release is intended to and does fully release all such claims.

A few months later, before the due date of the first annual payment, John Henry Jones died. Alene C. Jones and Sheryl Wilfred, on behalf of her minor daughter, Johnetta, initiated proceedings under 33 U.S.C. § 909, claiming LHWCA death benefits from St. John Stevedoring. In defense of the claims, St. John Stevedoring urged the settlement agreement and further contended that Johnetta was illegitimate and was not a child within the meaning of the LHWCA. The matter was heard by an Adminis-

trative Law Judge who awarded benefits to Alene C. Jones but denied benefits to the child. On appeal, the BRB upheld the award to Alene C. Jones but reversed the ALJ and granted an award to the minor Johnetta. Both awards are now before us by virtue of the petition for review filed by St. John Stevedoring and INA.

Analysis

Filiation and Dependency

A child entitled to LHWCA death benefits is defined to include an "acknowledged illegitimate child dependent upon the deceased," 33 U.S.C. § 902(14). St. John Stevedoring contends that resort must be had to the law of Louisiana, the state of Johnetta's domicile, to determine her filiation. The ALJ accepted their argument because as he noted, there is no body of federal family law.[1] The BRB disagreed with the ALJ's legal conclusion as to the applicable law. So do we.

---

1. The ALJ relied on La.Civ.Code art. 209, which provides in pertinent part:

> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> C. The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages.

In *Texas Employers' Insurance Assn. v. Shea,* 410 F.25 56 (5th Cir.1969), we opined that "acknowledgment of paternity does not require a notary's seal or other ritualistic proclamation." *See also Weyerhaeuser Timber Co. v. Marshall,* 102 F.2d 78 (9th Cir.1939). Application of rigorous state law schemes for proof of paternity, designed to serve various state interests such as the orderly devolution of property, especially immovable property, is inconsistent with the history and tradition of liberal administration of benefits under the LHWCA. *Voris v. Eikel,* 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953). While state law may prove helpful in that a child under state law would likely be a child under the LHWCA, the converse would not necessarily follow. As *Shea* and other cases indicate, because state law precludes a designation of paternity will not bar LHWCA benefits if a paternal link is proven. As we observed nearly a half-century ago, "in construing the act [LHWCA] we are not bound by technical definitions but must interpret it by giving to the words used their ordinary meaning." *Maryland Casualty Co. v. Lawson,* 101 F.2d 732 (5th Cir.1939).

Applying this common sense approach to the definitional process, the BRB readily concluded that "the evidence overwhelmingly supports a finding of acknowledgment." The record contains a sworn deposition by John Henry Jones and the sworn testimony of Sheryl Wilfred that Johnetta is their child. Johnetta is identified as a child in John Henry Jones' will and was listed as his child in the obituary prepared by his family. The only contra evidence is that his name does not appear as father on Johnetta's birth certificate. In light of this evidence, and its conclusion that the ALJ had applied the wrong legal

standard, the BRB reversed his finding on filiation. We affirm the BRB on this issue.

St. John Stevedoring next argues that Johnetta was not dependent on her father for financial support at "the time of the injury." 33 U.S.C. § 909(f). On May 22, 1979 Johnetta had been conceived. She was born the following October.

A child *en ventre sa mere* is dependent on a LHWCA-covered worker if, at the time of the accident, the child's mother was dependent on that worker. *Texas Employers' Insurance Ass'n v. Shea.* In determining the dependency of the mother and child, the LHWCA does not require that the mother be supported entirely by the covered worker; partial dependency is sufficient. *Texas Employers Ins. Ass'n v. Sheppeard,* 62 F.2d 122 (5th Cir.1932). Dependency may result if the injured party was "maintaining or helping to maintain the dependent in his customary standard of living." *United States Fidelity & Guaranty Co. v. Britton,* 188 F.2d 674 (D.C.Cir.1951).

During the time Sheryl Wilfred carried Johnetta to term, she received regular financial aid from John Henry Jones. The uncontroverted testimony reflects that from the time Johnetta was *in utero,* and continuing to the date of his death, John Henry Jones sent Ms. Wilfred hundreds of dollars for their support, notably in regular payments. In addition, he bought the child clothing and gifts. Applying the test articulated in *Sheppeard, Standard Dredging Corp. v. Henderson,* 150 F.2d 78 (5th Cir.1945), and similar cases, to the pertinent facts herein, we fully agree with the BRB's finding of dependency. Johnetta Rene Wilfred is

an eligible child, entitled to death benefits under the LHWCA.

The Settlement

Petitioners did not contest the eligibility of Alene C. Jones but vigorously argued that her claim, as well as that of Johnetta, was foreclosed by the settlement agreement. Alternatively, they claimed a credit for the amount received in settlement.

The BRB rejected petitioners' arguments and concluded that the mother's claim was not barred by 33 U.S.C. § 933(g), which provides that if a "person entitled to compensation" compromises a third-party claim for less than the total compensation payable, he must first secure the employer's permission to settle. The BRB concluded that Alene C. Jones was not a "person entitled to compensation" when she signed the settlement agreement. As to the credit or off-set petitioners claimed under 33 U.S.C. § 933(f), the BRB used the same reasoning. Alene C. Jones was not a "person entitled to compensation" at the time of the settlement.

We do not disagree necessarily with the reasoning of the BRB on this statutory interpretation, but we perceive a contractual basis for requiring a credit. In the settlement agreement which Alene C. Jones voluntarily signed, although she was not a party to her son's tort action, she received $5,000 in cash and the contractual right to any of the annual $280,000 payments falling due after the death of John Henry Jones and before December 1986. In return for the cash payment and contingent right, she waived and reelased all rights, including any wrongful death claims, against the tortfeasors. In addition she agreed that St.

John Stevedoring and INA would "receive a credit therefor for accrual of all compensation benefits . . . in the future." In doing so, Alene C. Jones obligated herself to give the employer and compensation carrier credit for all sums she received as a result of the tort settlement agreement. And as the BRB observed, her recovery of the $5,000 at signing and the $1,400,000 in annual payments far exceeds the death benefits she could have received under the LHWCA. St. John Stevedoring and INA are entitled to a credit for the full amount of compensation benefits owed to the decedent's mother. *See Peters v. North River Ins. Co. of Morristown, N.J.*, 764 F.2d 306 (5th Cir.1985); *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980).

That same reasoning does not apply to the minor child. Petitioners argue that because the decedent settled for his "heirs, executors, administrators, assigns, next of kin, or other legal representatives," the claim on behalf of the minor Johnetta is barred. The BRB did not so conclude, nor do we. John Henry Jones did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter. The Act clearly contemplates that the rights of minors and those found mentally incompetent are to be protected. Section 911 envisions the appointment "by a court of competent jurisdiction" of a guardian for a minor, one who would then be empowered to act on behalf of the minor. Presumptively the law of Louisiana, Johnetta's domicile, would control. If not, the law of decedent's domicile, Texas, would. Under the laws of either state, court approval is required to compromise and settle a minor's claims. La.Code Civ.P. 4265; Rule 44, Tex.R.Civ.P. Nothing in this record re-

flects that such was done; indeed it is obvious that it was not done. The minor's rights, accordingly, are unaffected by the settlement agreement signed by her father.

Conclusion

We conclude that the BRB correctly found both Alene C. Jones and Johnetta Rene Wilfred eligible for LHWCA death benefits as a consequence of the death of John Henry Jones. In that regard, the petition for review is DENIED. However, we further conclude that St. John Stevedoring and INA are entitled to a credit against the compensation death benefits due Alene C. Jones for the sums she received by virtue of the settlement agreemnet she signed on December 23, 1981. That credit offsets in full her claim for benefits, and to that extent the petition for review is GRANTED.

Petition for review DENIED in part and GRANTED in part.

Supreme Court, U.S.
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Nos. 87-273 and 87-381

In the Supreme Court of the United States

OCTOBER TERM, 1987

ST. JOHN STEVEDORING COMPANY, ET AL.,
PETITIONERS

v.

JOHNETTA WILFRED

ALENE C. JONES, PETITIONER

v.

ST. JOHN STEVEDORING COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a surviving dependent parent's death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, may be subject to an offset as the result of a third-party settlement signed by the decedent and the surviving parent.

2. Whether the court of appeals properly concluded that a surviving minor child is entitled to death benefits under the Longshore and Harbor Workers' Compensation Act, as an "acknowledged illegitimate child dependent upon the deceased," where ample uncontroverted evidence indicated both acknowledgement of paternity and dependency.

3. Whether a surviving minor child's claim to receive death benefits under the Longshore and Harbor Workers' Compensation Act may be extinguished or reduced by a settlement of a third-party tort suit that was entered into by the employee on behalf of himself and his "heirs [and] next of kin," but in which the child was not separately represented.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-273

ST. JOHN STEVEDORING COMPANY, ET AL., PETITIONERS

v.

JOHNETTA WILFRED

No. 87-381

ALENE C. JONES, PETITIONER

v.

ST. JOHN STEVEDORING COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (St. John Pet. App. A1-A7)[1] is reported at 818 F.2d 397. The opinion of the Benefits Review Board (St. John Pet. App. B1-B9) is reported at 18 Ben. Rev. Bd. Serv. (MB) 68. The opinion of the administrative law judge (St. John Pet. App. C1-C10) is reported at 17 Ben. Rev. Bd. Serv. (MB) 109.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1987. Petitions for rehearing were denied on

[1] "St. John Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-273.

July 1, 1987 (St. John Pet. App. A8-A9). The petition for a writ of certiorari in No. 87-273 (St. John Pet.) was filed on August 15, 1987. The petition for a writ of certiorari in No. 87-381 (Jones Pet.) was filed on September 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. John Henry Jones was injured on May 27, 1979, while working for petitioner St. John Stevedoring Co. (St. John) (St. John Pet. App. A1, B2, C3). As a result of that injury, St. John paid compensation benefits to Jones under the Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.*

The issues in this case arise from an agreement entered into on December 23, 1981, settling a tort suit Jones had brought against third parties in connection with his injury (St. John Pet. App. A1-A2).[2] The settlement agreement[3] was executed by Jones, his mother (petitioner Alene Jones), his employer (St. John), the employer's insurer (Insurance Company of North America (INA)) and several tort defendants (*id.* at A2), and provided that the tort defendants would immediately pay to Jones $1.78 million, and further provided for prospective annual payments of $280,000 for the rest of Jones's life, commencing in December 1982 (*ibid.*).[4] The settlement agreement contemplated that if Jones died before December 1986, then the annual payments would continue to be paid through December 1986 to his mother or, in the event of

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[2] By the date of the settlement Jones's LHWCA compensation totaled $291,839.71 (St. John Pet. App. A1).

[3] The settlement agreement is reproduced at pages 24-33 of the appendix to the petition for a writ of certiorari in No. 87-381.

[4] In addition, Jones's mother received an immediate cash payment of $5,000 (Pet. App. A2).

her death, to Jones's estate (*ibid.*). In addition to resolving all claims against the third-party tortfeasors, the settlement provided that St. John and its insurer would be fully reimbursed for the benefits they paid under the LHWCA and would receive " 'a credit * * * for accrual of all compensation benefits and medical expenses in the future' " (*ibid.*). The settlement agreement specified the parties' intent to bind Jones's " 'heirs, executors, administrators, assigns, next of kin, or other legal representatives' " (*id.* at A6).

Jones died in June 1982, before the date upon which the first annual payment prescribed in the agreement was due (St. John Pet. App. A2, B2, C3). Under the terms of the settlement, therefore, Jones's mother received more than $1.4 million ($5,000 plus five annual payments of $280,000 each) (*id.* at A6). Independent of the settlement, Jones's mother filed a separate claim under Section 9 of the LHWCA, 33 U.S.C. 909, for death benefits from the employer, as did Sheryl Wilfred, on behalf of Jones's alleged minor daughter Johnetta Wilfred (Pet. App. A2, C1). Those latter claims are the subject of this action.

2. The administrative law judge (ALJ) awarded LHWCA death benefits to Jones's mother on the ground that she had been economically dependent on Jones (St. John Pet. App. C4), but denied benefits to Jones's putative daughter (*id.* at C10). The ALJ explained that state law is dispositive on the question whether a claimant is decedent's "child" for purposes of statutory eligibility[5] "because the LHWCA does not define this operative term" (*id.* at C5). The ALJ concluded that, under the standards established by the law of Louisiana (the state in which the

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[5] Section 2(14) of the LHWCA, 33 U.S.C. 902(14), says that a child entitled to death benefits includes an "acknowledged illegitimate child dependent upon the deceased."

the child was domiciled (*id.* at C5-C6)), "it ha[d] not been definitively established that the decedent was the natural father" (*id.* at C9).

3. The Benefits Review Board (BRB or the Board) reversed the ALJ's denial of benefits to the child (St. John Pet. App. B9).[6] The Board ruled that federal, not state, law controlled whether Jones had acknowledged paternity for purposes of the Act, and that, under federal law, "the evidence overwhelmingly supports a finding of acknowledgement" (*id.* at B4). The Board also concluded that "uncontradicted testimony" established the child's dependency as a matter of law (*id.* at B6) and that she was therefore entitled to receive statutory death benefits.

The Board affirmed the ALJ's award of benefits to Jones's mother. It rejected (St. John Pet. App. B7) the argument that Section 33(g) of the Act, 33 U.S.C. 933(g), requiring third-party settlement agreements to be approved in writing by the employer and timely filed with the Department of Labor, bars statutory compensation here. That provision, it said, is applicable only if the amount of the third-party settlement is less than the compensation awarded under the Act, and in this case the settlement was for considerably more than the amount of statutory death benefits (St. John Pet. App. B7). Further, the Board stated (*ibid.*) that, in any event, the procedural formalities of Section 33(g) did not apply to Jones's mother because, as Jones was still living at the time of the settlement, his mother was not then a "person entitled to compensation" in the form of death benefits within the meaning of Section 33(g)(1), 33 U.S.C. (Supp. III) 933(g)(1).

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[6] The Director, Office of Workers' Compensation Programs, to whom the Secretary of Labor has delegated authority to administer the Act (20 C.F.R. 701.202, 802.410(b)), is an automatic party in LHWCA cases. 20 C.F.R. 801.2(10); *Ingalls Shipbuilding Division* v. *White*, 681 F.2d 275, 279 (5th Cir. 1982); *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 482 (D.C. Cir. 1982).

Relying upon its conclusion that Jones's mother was not a "person entitled to compensation" within the meaning of Section 33(g), the Board also reasoned that St. John was not entitled under Section 33(f), 33 U.S.C. 933(f), to reduce its LHWCA benefits payments to Jones's mother to reflect the third-party settlement (St. John Pet. App. B8). In the Board's view, "the settlement was entered into prior to death and presumably compensated the employee and mother for loss due to the employee's disability, rather than loss due to his death" (*ibid.*).

4. The court of appeals affirmed the Board's award of benefits to Jones's illegitimate child and reversed the Board's denial of St. John's request that money paid pursuant to the settlement be credited against benefits owing to Jones's mother (Pet. App. A7).

The court of appeals reasoned that Johnetta Wilfred was an "acknowledged illegitimate child dependent upon the deceased" (33 U.S.C. 902(14)), and thus was entitled to LHWCA death benefits. The court relied (St. John Pet. App. A4) on *Texas Employers' Insurance Ass'n* v. *Shea*, 410 F.2d 56 (5th Cir. 1969) and *Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78 (9th Cir. 1939)), to support the proposition that even if state law precludes a designation of paternity, LHWCA benefits may still be awarded if a paternal link is proved. On the facts of this case, the court of appeals concurred in the Board's conclusion that " 'the evidence overwhelmingly supports a finding of acknowledgment' " (St. John Pet. App. A4). The court also agreed with the Board that the child, who was in utero at the time of Jones's injury, was dependent on Jones (*id.* at A4-A5).

With respect to Jones's mother, the court stated that it "do[es] not disagree necessarily with the reasoning of the BRB on th[e] statutory interpretation" that Jones's mother was statutorily barred from death benefits or required by statute to set off settlement monies against them, because

at the time the settlement agreement was formalized she was not a "person entitled to compensation" under either Section 33(g) of Section 33(f) of the LHWCA. But the court also found that by participating in the settlement Jones's mother had "obligated herself to give the employer and compensation carrier credit for all sums she received as a result of the tort settlement agreement" (St. John Pet. App. A6). Since her recovery under the settlement would far exceed any death benefits under the LHWCA, the court therefore decided that St. John and its insurer "are entitled to a credit for the full amount of compensation benefits owed to the decedent's mother" (*ibid.*).

By contrast, the court rejected St. John's argument that a similar set-off should be applied to the minor child's LHWCA benefits. Although the settlement agreement purported to bind Jones's " 'heirs * * * [and] next of kin' " (St. John Pet. App. A6), at the time of the settlement Johnetta Wilfred was not represented by a statutory guardian responsible for protecting her rights (§ 11, 33 U.S.C. 911). The court therefore concluded that Jones lacked authority to settle or waive in advance any right to death benefits that might accrue to his child (St. John Pet. App. A7).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioners in No. 87-273 (St. John and INA) contend (Pet. 7-10) that the court of appeals and the Board improperly substituted their views for those of the ALJ on the question of filiation and impermissibly made findings as to dependency even though the ALJ had not reached that issue. Petitioners, however, misperceive the nature of

the review function exercised by the Board and affirmed by the court of appeals.

Section 9(c) of the LHWCA, 33 U.S.C. 909(c), entitles a surviving "child" to death benefits in the event of an "injury [that] causes death,"[7] and Section 2(14), 33 U.S.C. 902(14), defines "child" as including an "acknowledged illegitimate child dependent upon the deceased." The ALJ held (St. John Pet. App. C5-C6) that state law governs the question whether one is a decedent's "child" within the meaning of the Act "because the LHWCA does not define this operative term."

The Board correctly applied federal rather than state law to this issue and the court of appeals correctly upheld that decision. It has long been settled that in determining whether an illegitimate child is entitled to benefits under the Act, the statutory definition is "complete in itself" and does not require resort to state law. *Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78, 81 (9th Cir. 1939) ("Congress having provided all definitions necessary to the determination of whether claimant is a 'child' and its authority being paramount and exclusive as to the subjects on which it has legislated, it is not allowable to go beyond the Act provisions.").[8] It is likewise settled under the

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[7] At the time of the employee's death in 1982, the LHWCA also provided death benefits "if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(d), 86 Stat. 1253-1254. That broader death benefits provision was in effect between 1972 and 1984. See, *e.g.*, *Travelers Insurance Co.* v. *Marshall*, 634 F.2d 843 (5th Cir. 1981).

[8] Having found that the ALJ's findings of filiation rested on an erroneous view of the law, the Board correctly set them aside on that basis. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982). See also *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *United States* v. *Singer Mfg. Co.*, 374

LHWCA that acknowledgment—the statutory standard for paternity[9]—"does not require a notary's seal or any other ritualistic proclamation." *Texas Employers' Insurance Ass'n* v. *Shea*, 410 F.2d 56, 61 (5th Cir. 1969).

U.S. 174, 194 n.9 (1963). Moreover, as the court of appeals noted (St. John Pet. App. A4), the Board "readily concluded that 'the evidence overwhelmingly supports a finding of acknowledgment.' " Remand was unnecessary on the question of filiation because "the record permits only one resolution of the factual issue." *Pullman-Standard*, 456 U.S. at 292 (citing *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974)). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).

For the same reason, there was no need for the Board to remand to the ALJ on the question of dependency. Johnetta Wilfred was conceived five days before her father was injured, and "[d]uring the time Sheryl Wilfred carried Johnetta to term, she received regular financial aid from John Henry Jones" (St. John Pet. App. A5). The court of appeals, concurring in the Board's finding of dependency, emphasized (*ibid.* (emphasis in original)):

> The uncontroverted testimony reflects that from the time Johnetta was *in utero*, and continuing to the date of his death, John Henry Jones sent Ms. Wilfred hundreds of dollars for their support, notably in regular payments. In addition, he bought the child clothing and gifts.

As the court held (*ibid.*), these facts fully established dependency under the LHWCA. See *Texas Employers' Insurance Ass'n* v. *Shea, supra; United States* v. *Fidelity & Guaranty Co.* v. *Britton*, 188 F.2d 674 (D.C. Cir. 1951); *Standard Dredging Corp.* v. *Henderson*, 150 F.2d 78 (5th Cir. 1945); *Texas Employers' Insurance Ass'n* v. *Sheppeard*, 62 F.2d 122 (5th Cir. 1932).

[9] Petitioners suggest (St. John Pet. 7-8), based on *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), that the acknowledgment requirement is unconstitutional. Even if this argument were meritorious, it would not help their case; eliminating acknowledgment as a factor would not strengthen the employer's case because it would become easier for a child to establish entitlement to benefits. In any event, *Weber* held that a state worker's compensation statute violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against an unacknowledged illegitimate who was otherwise dependent on the injured worker. "[D]ependency, not the legality

2. Petitioner in No. 87-381, Jones's mother, contends (Pet. 9) that the court of appeals incorrectly required her to set off against her statutory death benefits the amount received from the third-party tortfeasors—thus entirely cancelling out her claim to statutory benefits.[10] She contends that since she was not entitled to any benefits under the LHWCA at the time the third-party settlement was executed, the settlement could not have extinguished her statutory right to death benefits (*id.* at 10). In the alternative, petitioner contends that her participation in the settlement was not fatal to her right to receive death benefits under the LHWCA as a matter of contract interpretation (*id.* at 11-14).

The Board held, and the court of appeals did "not disagree necessarily" that Mrs. Jones's entitlement to benefits was not barred by her failure to comply with the procedural requirements of Section 33(g), nor were her benefits subject to an offset under Section 33(f). Section 33(g) provides that in order for a "person entitled to compensation" to compromise a claim against a third-party for less than the total compensation payable under the statute, that person must first secure the employer's permission to settle. That Section is not applicable here because the settlement amount *exceeded* the death benefits (see note 10, *supra*). Section 33(f),[11] which generally provides for off-

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of the father's nuptials, [has always been] the keynote of coverage" under the LHWCA (*Texas Employers' Insurance Ass'n* v. Shea, 410 F.2d 56, 59 (5th Cir. 1969)).

[10] As previously noted (page 3, *supra*), petitioner received $5,000 in her own right during Jones's lifetime, and $1.4 million after his death under the contingency provided for in the settlement. By contrast, petitioner's statutory death benefits could not amount to more than a few thousand dollars a year. See St. John Pet. App. B7 & n.5.

[11] Section 33(f), 33 U.S.C. (Supp.III) 933(f), provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the

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set of third-party tort recoveries against compensation benefits, likewise does not apply because, as the Board stated, Mrs. Jones was not a "person entitled to compensation" within the meaning of that section at the time she entered into the settlement (St. John Pet. App. B7-B8). The court of appeals, without questioning any of this reasoning, "perceiv[ed] a contractual basis for requiring a credit," arising from an explicit term of the settlement agreement which Jones's mother signed (*id.* at A6).

The issue does not warrant further review. The decision of the court of appeals rests on the particular language of the settlement agreement in this case, a factbound determination lacking in general application or significance other than to the parties. In any event, the court of appeals reached the correct result.[12]

> employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

The Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §§ 21(c) and (d), 98 Stat. 1652, amended Section 33(f) and (g) in ways that are not material to the disposition of the petitions in this case.

[12] Like the court of appeals, we do not quarrel with the Board's conclusion that because Jones's mother was not then entitled to LHWCA benefits Section 33(f) was inapplicable when the settlement was executed. A basic principle of workers' compensation law is that a dependent's right to death benefits is independent from the employee's compensation claim and does not arise until the employee's death. 2 A. Larson, *The Law of Workmen's Compensation* § 64.11 (1987); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979) ("the cases under the Longshoremen's Act have consistently held that the right to death benefits is separate and distinct from the right to disability benefits and does not arise until death occurs"); *International Mercantile Marine Co.* v. *Lowe*, 93 F.2d 663, 665 (2d Cir.) ("[w]hen death occurs, a new cause of action arises which requires an

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3. Petitioners in No. 87-273, St. John and INA, further contend (Pet. 5-7) that the third-party settlement entitled them to an offset against the future death benefits not only of Jones's mother—a signatory to the agreement—but against the future death benefits of the minor daughter as well. In support of this contention, petitioners recite (*id.* at 6) that Jones settled his third-party claim, not only for himself, but also for his " 'next of kin' " and thereby cut off the child's claims against the third-party tortfeasors.

The court of appeals stated that Jones "did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter" (Pet. App. A7). As the court noted (*ibid.*), the LHWCA favors the protection of the rights of minors, specifically through the appointment, as appropriate, of a guardian "by a court of competent jurisdiction." 33 U.S.C. 911. In the present case, there was no court-appointed legal guardian to represent the

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adjudication on all questions such as accident, notice of death, claim, causal relationship, and dependency"), cert. denied, 304 U.S. 565 (1938).

The Board's view would not preclude the possibility that Section 33(f) became applicable when Mrs. Jones became "entitled to compensation," viz., at the moment of her son's death. Under this reading, any amount that she recovered under the settlement agreement before her son's death would not be subject to the statutory offset. The amount she received after his death, however, could be offset against future death benefits if the settlement agreement contemplated that result. Since such an offset, limited to payments received after the settling parent became entitled to benefits, is permitted by the language and purpose of Section 33(f), it is not inconsistent with the policy against release of statutory entitlements expressed in Section 16 of the LHWCA, 33 U.S.C. 916. See *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F.2d 265 (N.D. Ill. 1930). Moreover, recognition of an offset under Section 33(f) fully effectuates the statutory policy against double recovery. *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 542 (1933). See also *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 79, 87 (1980); *Carter* v. *Director, OWCP*, 751 F.2d 1398, 1400-1402 (D.C. Cir. 1985).

interests of the child in the settlement. Unlike Jones's mother, therefore, his daughter did not participate in execution of the settlement, and she received nothing under the settlement either before or after her father's death. On the other hand, petitioners St. John and INA had intervened in the third-party suit and were parties to the settlement. See Jones Pet. App. 24, 32-36. Petitioners' interests were fully represented and they have no cause to complain that the settlement indirectly prejudiced their rights as against the unrepresented minor.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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